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QUESTIONS PRESENTED

I.

Under the Jones Act can a seaman employed by a state bring an action against the state for money damages for personal injury in the course of her employment when Congress has not unequivocally expressed its intention to authorize an action for money damages against a state?

II.

Assuming arguendo that the Jones Act authorizes an action against a state for money damages, does the Jones Act authorize bringing the action in federal court?

III.

Assuming arguendo that the Jones Act authorizes an action against a state for money damages, but does not authorize bringing the action in federal court, does the Texas Tort Claims Act authorize a Texas seaman to bring a Jones Act claim against Texas in federal court?

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NO. 85-1716

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JEAN E. WELCH,

Petitioner,

V.

THE STATE DEPARTMENT OF HIGHWAYS
AND PUBLIC TRANSPORTATION AND
THE STATE OF TEXAS,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

TO THE HONORABLE JUSTICES:

NOW COME the State Department of Highways and Public Transportation and the State of Texas, respondents, by and through their attorney, the Attorney General of Texas, and file this brief on the merits.

OPINIONS AND JUDGMENTS BELOW

Plaintiff seeks reversal of the decision of the United States Court of Appeals for the Fifth Circuit, sitting en banc, which is reported at 780 F.2d 1268 and reprinted at pages 1a-46a of the appendix to the petition for writ of certiorari. The panel opinion of the Fifth Circuit is reported at 739 F.2d 1034 and reprinted at pages 49a-74a of the appendix to the petition for writ of certiorari. The memorandum opinion and order of the district court is reported at 533 F. Supp. 403 and reprinted at pages 75a-81a of the appendix to the petition for writ of certiorari, as well as pages 21-28 of the joint appendix.

JURISDICTION

The judgment of the court of appeals, sitting en banc, was entered on January 22, 1986. A timely petition for writ of certiorari was filed on April 21, 1986. A writ of certiorari was granted on October 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

(Set Forth in Appendix)

U.S. Const. art. III, § 2.

U.S. Const. amend. XI.

The Necessary and Proper Clause, U.S. Const. art. I, § 8.

The Jones Act, 46 U.S.C. § 688(a).

The Texas Tort Claims Act, ch. 292, 1969 Tex. Gen. Laws 874, *amended by* ch. 50, 1973 Tex. Gen. Laws 77.

Tex. Rev. Civ. Stat. Ann. art. 6674s, § 2 & § 6 (Vernon 1977).

STATEMENT OF THE CASE

The State of Texas, through her State Department of Highways and Public Transportation, operates a ferry boat

service between Galveston Island, Texas, and Port Bolivar, Texas. (J.A. 9.) Plaintiff was employed by Texas to work on the ferry boat. (J.A. 9.) She alleges that she was injured when a mobile crane fell on her in the course of her employment as a "seaman." (J.A. 9-10.) Invoking the Jones Act, 46 U.S.C. § 688, she brought an action against the State Department of Highways and Public Transportation and the State of Texas in the United States District Court for the Southern District of Texas, Houston Division. (J.A. 8-17.)

Texas moved to dismiss the action on the ground that a Jones Act claim could not be maintained against the state in federal court consistent with the principles of sovereign immunity exemplified by the eleventh amendment.[1] (J.A. 18-20.) The district court dismissed, holding both that the Jones Act does not authorize an action against the state in federal court and that the Texas Tort Claims Act does not authorize a claimant to bring a Jones Act claim against the state in federal court but instead limits all state employees to state workers' compensation for personal injuries sustained in the course of employment. *Welch v. State Dep't of Highways and Public Transp.*, 533 F. Supp. 403 (S.D. Tex. 1982). A panel of the Court of Appeals for the Fifth Circuit reversed the district court. *Welch v. State Dep't of Highways and Public Transp.*, 739 F.2d 1034 (5th Cir. 1984). The court of appeals, sitting en banc, corrected the panel's error and affirmed the district court. *Welch v. State Dep't of Highways and Public Transp.*, 780 F.2d 1268 (5th Cir. 1986) (en banc).

SUMMARY OF ARGUMENT

The court of appeals, sitting en banc, should be affirmed. The

1. Whatever the extent of the sovereign immunity of a state, it extends to departments or agencies of the state that have no existence apart from the state. *Alabama v. Pugh*, 438 U.S. 781, 781-82, 98 S.Ct. 3057, 3057 (1978). Since 1933 the State Department of Highways and Public Transportation has been authorized by state statute to operate a ferry to connect state highways. *See* Tex. Rev. Civ. Stat. Ann. art. 6812a (Vernon 1960). The State Department of Highways and Public Transportation is an agency of Texas, created by a Texas statute, with no existence apart from Texas. *See* Tex. Rev. Civ. Stat. Ann. art. 6663-6674 (Vernon 1977 & Vernon Supp. 1986). The department therefore enjoys the same immunity as Texas. For economy, Texas will be referred to as the sole defendant—respondent.

doctrine of sovereign immunity, exemplified by the eleventh amendment, shields Texas from plaintiff's claim against the state for money damages under the Jones Act. Presumably Congress could in the exercise of its constitutional powers abrogate this immunity and subject Texas to an action for money damages in either federal or state court.

Before finding that Congress has authorized an action in federal court against a state, however, this Court requires an "unequivocal expression of congressional intent." Likewise the Court should require an unequivocal expression of intent before finding that Congress has authorized an action against a state at all. After *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005 (1985), which leaves the states to the vagaries of the political process for the protection of their role in our federal system, requiring an unequivocal expression of congressional intent before applying a federal statute to the states is critical. Such a requirement ensures both specific notice to the states of proposed legislation and specific congressional consideration of how proposed legislation may affect the states. These measures are necessary to fulfill the promise that the political process will safeguard the states.

A search for congressional intent as to the Jones Act does not yield an unequivocal expression regarding the states. Nothing about the Jones Act suggests that Congress ever contemplated applying it to the states, much less authorizing actions against the states in federal court. Plaintiff, relying upon dicta in *Petty v. Tennessee Missouri Bridge Comm'n*, 359 U.S. 275, 79 S.Ct. 785 (1959), argues that the general provision that any seaman may bring an action against his employer includes seamen employed by the states. The general term "any seaman," however, does not provide the specific notice to the states or evidence the specific congressional contemplation of the affect of the legislation upon the states that the requirement of an unequivocal expression is designed to ensure. The *Petty* court dicta should be rejected.

Moreover, the legislative history of the Jones Act reveals no intention to include the states within its terms or to authorize an action against the states in federal court. Given this legislative history, the Court should not conclude that the

representatives of the several states intended to abrogate the immunity of the states.

With nothing in the language or history of the Jones Act to show congressional intent to abrogate immunity, plaintiff points to the incorporation into the Jones Act of the Federal Employers' Liability Act (FELA), which has been held to authorize an action against the states. The FELA, however, is incorporated into the Jones Act to define the right and remedies of a "seaman," not to define who is a seaman or whom a seaman may sue. In short, plaintiff fails to establish an unequivocal expression of congressional intent either to apply the Jones Act to the states or to authorize an action against the states in federal court.

Lacking an unequivocal expression, plaintiff argues that Texas has consented to suit either "constructively" under the rationale of *Parden v. Terminal Ry.*, 377 U.S. 184, 84 S.Ct. 1207 (1964), or expressly in the Texas Tort Claims Act. Both these arguments fail for a single reason: If Congress did not intend the Jones Act to apply to the states, then Texas cannot be said to have consented to suit in federal court "constructively" by operating a ferry or "expressly" by enacting the Texas Tort Claims Act. Plaintiff loses her consent argument because she cannot establish that the Jones Act applies to the states.

Even assuming that Congress intended the Jones Act to apply to the states, the doctrine of "constructive" consent to suit in federal court announced in *Parden* has been effectively overturned in subsequent cases beginning with *Employees of Dep't of Public Health & Welf. v. Missouri*, 411 U.S. 279, 93 S.Ct. 1614 (1973). The Court now requires an unequivocal expression of congressional intent to authorize suit in federal court. As has been shown, no such intention is expressed in the Jones Act.

Neither does the Texas Tort Claims Act authorize suit in federal court. To win her argument that Texas has consented in the Texas Tort Claims Act to a Jones Act claim for money damages against the state in federal court, plaintiff must show two things. First, plaintiff must show that a claim under the Texas Tort Claims Act can be brought in federal court. Second,

plaintiff must show that her claim comes within the terms of the Texas Tort Claims Act. If plaintiff fails to establish either point, then she cannot proceed in federal court under the Texas Tort Claims Act.

Plaintiff fails to establish each point. Claims under the Texas Tort Claims Act cannot be brought in federal court. Before a state statute can be said to waive immunity to suit in federal court, the state statute must clearly declare such an intention. The Texas Tort Claims Act does not. Therefore, whatever rights the act gives plaintiff, the act does not authorize her to proceed in federal court.

Even were this Court to hold that the act authorizes suit in federal court, plaintiff's claim does not come within the terms of the act. The Texas Tort Claims Act authorizes an action against the state based upon state common-law negligence with liability limited to $100,000 for compensatory damages. A Jones Act claim does not come within these terms. The Texas Tort Claims Act also makes workers' compensation a state employee's exclusive remedy. Thus, plaintiff cannot proceed on her Jones Act claim in federal court under the Texas Tort Claims Act.

ARGUMENT

I. CONGRESS NEITHER INTENDED THE JONES ACT TO APPLY TO THE STATES NOR TO AUTHORIZE AN ACTION FOR MONEY DAMAGES AGAINST THE STATES IN FEDERAL COURT.

When considering whether a federal statute authorizes an action for money damages against a state in federal court, this Court has viewed the question as one of jurisdictional immunity to suit in federal court under the eleventh amendment. The Court has fallen into the custom of considering first whether a federal statute authorizes suit against a state in federal court, as opposed to whether it authorizes suit against a state at all, because the eleventh amendment is in "the nature of a jurisdictional bar," and jurisdictional questions are necessarily answered before substantive questions. *See Edelman v.*

Jordan, 415 U.S. 651, 677-78, 94 S.Ct. 1347, 1363 (1974).[2] The Court makes a mistake, however, in first considering the artificial question whether a federal statute authorizes suit in federal court. Instead, the Court should first consider whether a federal statute even applies to the states.

Answering this so-called substantive question is really the best first step in answering the jurisdictional question. If Congress did not intend a statute to apply to the states at all, then it certainly could not have intended to authorized an action against a state in federal court. Likewise, if Congress did not intend a statute to apply to the states at all, then a state cannot constructively or expressly "waive" eleventh amendment immunity or "consent" to jurisdiction under the statute.

As a matter of logic, congressional intent in enacting a statute is more likely to be discerned if the Court first decides whether Congress intended to authorize an action for money damages against the state at all—in any court. Only if the answer to this question is yes is it then helpful to ask whether Congress intended such an action to be brought in federal court. *Welch*, 780 F.2d at 1275 (Higginbotham, J., concurring).

As a matter of economy, bringing a case against a state under a federal statute in federal court only to have it dismissed because Congress never intended to authorize suits against the states in federal court and starting the case over in state court under the same federal statute only to have it dismissed because Congress never intended the statute to apply to the states at all is terribly wasteful of the resources of the parties, the federal courts, and the state courts. The Court should ask first whether a federal statute applies to the states and then whether it authorizes suit in federal court. *See Employees*, 411 U.S. at 287-89, 93 S.Ct. at 1619 (Marshall, J., concurring).

In this brief, Texas answers both the substantive and jurisdictional questions. In subpart A, Texas explains why the

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2. Unlike a true jurisdictional bar, however, eleventh amendment immunity can be waived by a state. *See Employees Dep't of Public Health & Welf. v. Missouri*, 411 U.S. 279, 294-95, 93 S.Ct. 1614, 1623 (1973) (Marshall, J., concurring).

standard for statutory construction of a federal statute should be the same regardless whether the Court is addressing the substantive question or the jurisdictional question. In each case, the Court should require "an unequivocal expression of congressional intent" in order to maintain the constitutionally mandated balance of power between the states and the federal government.

In subpart B, Texas shows that the Jones Act does not unequivocally express a congressional intention either to apply the Jones Act to the states or to authorize an action for money damages against the states in federal court. Since, if Congress did not intend to do the first, it could not have intended to do the second, these two questions of intent—substantive and jurisdictional—are analyzed together.

Then, in subpart C, Texas shows that because federal seamen are excluded from the Jones Act, the Court can only conclude that the Jones Act excludes state seamen.

A. Just as an unequivocal expression of congressional intent is required to find that Congress means to abrogate a state's jurisdictional immunity to suit in federal court, an unequivocal expression of congressional intent should be required to find that Congress means to abrogate a state's substantive immunity to suit.

1. An unequivocal expression of intent is required to find that Congress means to abrogate a state's jurisdictional immunity to suit in federal court.

The Court continually reaffirms that Congress must make a clear statement of any intention to abrogate the eleventh amendment bar to suits against the states in federal court.[3]

3. The AFL-CIO as amicus urges the Court to overrule *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504 (1890), and argues that this case presents an "appropriate occasion" for reconsidering whether the doctrine of sovereign immunity, as exemplified by the eleventh amendment, immunizes states from actions brought by private parties in federal court to enforce substantive federal rights. *See Brief of the American Federation of Labor and Congress*

(Footnote continued on next page)

See Atascadero State Hosp. v. Scanlon, 105 S.Ct. 3142, 3147-48 (1985); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S.

(Footnote continued from previous page)
of Industrial Organizations as Amicus Curiae Supporting Petitioner at 2-3. Texas contends for two different reasons that this case does not present an appropriate occasion for reconsidering *Hans* or its theory of sovereign immunity.

First, the question whether a state is immune from an action brought by a private party in federal court to enforce a substantive federal right arises in this case only if the Court concludes that Congress intended the Jones Act to apply to the states. As Texas shows, Congress had no such intention. Thus, there is no substantive federal right to enforce in federal court and no reason to reconsider *Hans*.

Second, in urging the overruling of *Hans*, the AFL-CIO presents a ground for decision not urged by petitioner or considered by the courts below. Were this Court to seriously consider overruling *Hans*, it should choose a case in which the issue has been fully developed through the decisional process, not a case in which the issue is interjected at the eleventh hour by a stranger.

Moreover, stare decisis counsels against overruling *Hans*. As the Court recognized when reaffirming *Roe v. Wade* in the *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 419-20, 103 S.Ct. 2481, 2487 (1983), "the doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." In this case, as in the *City of Akron*, "there are especially compelling reasons for adhering to *stare decisis*." *See id.*

Hans was unanimously decided almost a century ago. Since then it has been consistently reaffirmed by the Court. As a result, *Hans* has been assumed and relied upon as the allocation of power between the states and the federal government has been worked out. Imagine two columns of protections and powers. In Column A are the protections and powers of the states. In Column B are the protections and powers of the federal government. In the last century, protection and power has been steadily moved from Column A (the states) to Column B (the federal government). *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552-54, 105 S.Ct. 1005, 1019 (1985).

Assent to move protection and power from Column A to Column B was given based in part on what remained behind in Column A. Now, having gained assent to move protection and power over the last century from Column A to Column B, the proponents of an ever stronger federal government argue that sovereign immunity never belonged in Column A to begin with. The doctrine of stare decisis prevents such a flim-flam. "When rights have been created or modified in reliance on established rules of law, the arguments

(footnote continued on next page)

89, 99, 104 S.Ct. 900, 907 (1984) (*Pennhurst II*); *Quern v. Jordan*, 440 U.S. 332, 342-45, 99 S.Ct. 1139, 1145-47 (1979). In *Pennhurst II* the Court cast the test as requiring an "unequivocal expression of congressional intent." 465 U.S. at 99, 104 S.Ct. at 907. In *Atascadero* the Court adds "that Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." 105 S.Ct. at 3148.

This special rule of statutory construction is designed to protect the constitutional balance between the states and the federal government. The states "occupy a special and specific position in our constitutional system." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556, 105 S.Ct. 1005, 1020 (1985). The states are a "counterpoise to the power of the federal government." 469 U.S. at 571, 105 S.Ct. at 1028 (Powell, J., dissenting). This balance of power between the states and the federal government is part of the structural protections in the Constitution of our fundamental liberties. 469 U.S. at 572, 105 S.Ct. at 1029 (Powell, J., dissenting). The sovereign immunity of the states against suit in federal court serves to maintain this balance. *Atascadero*, 105 S.Ct. at 3147-48. Before finding that a federal statute abrogates immunity to suit in federal court, thereby undermining the balance of power, the federal courts should be certain of congressional intent. *Id.* To ensure certainty, the Court has fashioned a rule of statutory construction that requires an unequivocal expression of congressional intent. *Id.*

To escape the application of this rule, plaintiff relies upon the now discredited reasoning in *Parden v. Terminal Ry.*, 377 U.S. 184, 84 S.Ct. 1207 (1964). The bare majority that made up the *Parden* court reasoned that because the Federal Employers' Liability Act (FELA) is applicable to "every" common carrier, the FELA applies to state railroads. 377 U.S. at 187-88, 84 S.Ct. at 1210. The *Parden* court could have simply reasoned that Congress thereby abrogated the states' immunity to suit in federal court. Perhaps because it was doubted in

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against their change have special force." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272, 100 S.Ct. 2647, 2656 (1980) (Stevens, J.) Since the rights of the states have been modified in reliance upon *Hans*, the arguments against overruling *Hans* have this special force.

1964 whether Congress had such power, the *Parden* court instead found "consent" to suit in federal court by the state's choice of operating a railroad. 377 U.S. at 192-93, 84 S.Ct. at 1213.

The four dissenting justices in *Parden* argued that the majority was departing from the clear statement rule. 377 U.S. at 198-200, 84 S.Ct. at 1216-17. The dissenters' view ultimately prevailed in *Employees of the Dep't of Public Health and Welf. v. Missouri*, 411 U.S. 279, 93 S.Ct. 1614 (1973). In *Employees* the question was whether the Fair Labor Standards Act subjected a state to suit. Applying the clear statement rule, the *Employees* court held that it did not. In doing so, the *Employees* court limited *Parden* to its facts and expressly rejected the notion of constructive consent:

> [W]e decline to extend *Parden* to cover every exercise by Congress of its commerce power, where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the states and putting the states on the same footing as other employers is not clear.

411 U.S. at 286-87, 93 S.Ct. at 1619. Subsequently in *Edelman v. Jordan*, when again faced with a *Parden* argument, the Court wrote, "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights," and refused to apply *Parden*. 415 U.S. 651, 653, 94 S.Ct. 1347, 1360 (1979).

If the rationale of *Parden* does not apply to the FLSA in *Employees*, then it should not apply to the Jones Act. While the *Employees* court superficially distinguished *Parden* from *Employees* as a case of a "proprietary" railroad versus a "not for profit" hospital, the *Employees* court effectively overruled *Parden*. Whatever the merits of the *Employees* court's "proprietary" distinction at the time, *Garcia* exposes the "inability to give principled content to the distinction between 'governmental' and 'proprietary'." 469 U.S. at 543-47, 105 S.Ct. at 1010-1016. After *Garcia*, any basis for distinguishing *Parden* from *Employees* is gone. In short, the *Parden* court's notion of

constructive consent is dead and needs now only be interred.

Interring the rationale of *Parden* is not, as plaintiff implies, an abandoment of the principle of stare decisis. Just the opposite. The law before *Parden* and the law after *Parden* require a clear statement before concluding that a federal statute abrogates a state's immunity to suit in federal court. *Parden* stands alone. Moreover, as this Court recognized when on another occasion it faced a precedent that could not be squared with its more recent cases, "the same respect for the rule of law that requires us to seek consistency over time also requires us to seek consistency in the interpretation of an area of law at any given time." *Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 391, 103 S.Ct. 1905, 1916 (1983). This higher principle of stare decisis forces recognition that the rationale of *Parden* has long since been abandoned by the Court.

That the rationale of *Parden* has been abandoned does not mean that the result in *Parden* must be reversed. Even when the rationale for a particular statutory construction is recognized as flawed, the Court will presumptively adhere to a prior decision construing a legislative enactment because Congress could have changed the law if it deemed the prior decision wrong. *Illinois Brick Co. v. Illinois*, 431 U.S 720, 736-37, 97 S.Ct. 2061, 2070 (1977). With respect to the FELA, the Court may presume that it got the right result even if for the wrong reason. At the same time, for federal statutes yet to be construed, including the Jones Act, the Court should require an unequivocal expression of congressional intent before concluding that they abrogate immunity.[4]

4. One further point about *Parden* needs to be made. The *Parden* court found constructive consent *to suit in federal court* only after finding that the FELA applied to the states. If the Court is convinced that Congress never intended the Jones Act to apply to the states at all, as Texas will demonstrate in subpart B, then *Parden* has no application to this case. *Edelman*, 415 U.S. at 672, 94 S.Ct. at 1360. While the *Parden* court did reason that a state can constructively consent to suit in federal court, neither the *Parden* court nor any other court has ever suggested that a state can be found to have constructively consented to be governed by a federal statute that Congress never intended to apply to the states.

The requirement of an unequivocal expression of congressional intent found in the commerce case of *Employees* should be no different when Congress acts pursuant to its admiralty power. Any other result would be nonsensical. Congress after all has admiralty power only by inferring congressional authority through the necessary and proper clause in article I, § 8, and only to the extent that such power is necessary and proper to effectuate the grant of *judicial* power over admiralty in article III, § 2.[5] *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 39-40, 63 S.Ct. 488, 490 (1943); *Southern Pacific v. Jensen*, 244 U.S. 205, 214-15, 37 S.Ct. 524, 528 (1916). This judicial power, however, does not extend to the states. *In re New York*, 256 U.S. 490, 41 S.Ct. 588 (1921) *(New York I)* (holding that in rem admiralty jurisdiction does not reach a state without its consent); *In re New York*, 256 U.S. 503, 41 S.Ct. 592 (1921) (*New York II*) (holding that in personam admiralty jurisdiction does not reach a state without its consent). Because congressional power to reach the states under the necessary and proper clause of article I can necessarily be no broader than the article III judicial power from which it is derived, congressional admiralty power is likewise limited.

Compare commerce and admiralty power to power under the fourteenth amendment. Section 5 of the fourteenth amendment expressly grants Congress the power "to enforce, by appropriate legislation, the provisions of this article." Since the whole point of the fourteenth amendment is to limit state power, its grant of congressional power to enforce its provisions presumably includes the power to abrogate state immunity. Yet the Court still requires an unequivocal expression of congressional intent before reading a federal statute enacted pursuant to § 5 of the fourteenth amendment to abrogate a state's immunity to suit in federal court. *See, e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445, 453-57, 96 S.Ct. 2666, 2670-72 (1976). If a clear statement is required to abrogate immunity in fourteenth amendment cases, a fortiori a clear statement is required in commerce or admiralty cases.

5. The development of congressional admiralty power is traced in D. Robertson, *Admiralty and Federalism* 143-45 (1970). Texas does not argue that Congress could not apply the Jones Act to the states. Whatever the limit of admiralty power, the commerce power is probably a sufficient basis. *See id.* As *Employees* makes clear though, Congress must act unequivocally under the commerce clause.

2. The need for an unequivocal expression of congressional intent is as great if not greater when determining whether a federal statute abrogates substantive immunity to suit as when determining whether it abrogates jurisdictional immunity to suit in federal court.

The Court announced in *Garcia* that the "Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace." 469 U.S. at 550, 105 S.Ct. at 1017. If the Constitution delegates regulatory authority to Congress, and Congress determines to regulate the states by subjecting them to court actions for money damages, presumably Congress can do so. As Professor Laurence Tribe theorizes,

> Article III permits federal adjudication of suits against states that are properly authorized pursuant to article I, but article III does not of its own force abrogate the defense of sovereign immunity when that defense would otherwise be cognizable in federal court.

L. Tribe, *American Constitutional Law* § 3-37 at 139 (1978).

Given this view of congressional and judicial power, the states' position in the federal system is significantly weakened. The *Garcia* court, however, promises that the states will be protected by the political process:

> The principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraint that our system provides through state participation in federal government action. The political process ensures that laws that unduly burden the States will not be promulgated.

469 U.S. at 556, 105 S.Ct. at 1020.

Professor Tribe suggests that the clear statement rule has a critical role to play in ensuring that the states' interests are truly protected in the political process:

> By making a law unenforceable against the states unless a contrary intent is apparent in the language of the statute, the clear statement rule would further ensure that attempts to limit state power will be unmistakable, thereby structuring the legislative process to allow the centrifugal forces in Congress the greatest opportunity to protect the states' interests. Thus a recognition of the peculiar institutional competence of Congress in adjusting federal power relationships makes this an appropriate and useful approach to reconciling national power with state litigational immunity.

L. Tribe, *American Constitutional Law* § 3-37 at 140 (1978).

In his concurring opinion below, Judge Higginbotham echoes Tribes' view that the clear statement rule is necessary to ensure that the states are protected and adds an additional concern:

> *Garcia* concludes that the primary limit on this [federal] power is the political process of state participation in federal decisionmaking. If this process is to have its force, legislation that is meant to affect states must say so; states will then be aware of proposed federal legislation perceived to intrude into their operations, and will be able to draw their political weapons. But if legislation is silent or half-heartedly ambiguous as to its effect on states, and a court later declares that it applies to states, the process will have been skewed and the states will have been effectively sandbagged. The result would be a sidestepping of the structural protections outlined in *Garcia* and a return of the judges from the sidelines.

Welch, 780 F.2d at 1275-76.

By "a return of the judges from the sidelines," Judge Higginbotham means that being forced as a judge to deduce whether states are included in the federal statutory scheme " 'inevitably invites an unelected federal judiciary to make decisions about which . . . policies it favors and which it dislikes.' " *Welch*,

780 F.2d at 1275 (quoting *Garcia*, 469 U.S. at 546, 105 S.Ct. at 1015). Requiring a clear statement of congressional intent both protects the states and keeps the federal courts out of the business of making policy.

Judge Higginbotham concludes:

> The concepts of federalism upon which *Garcia* assertedly rests require that we construe federal statutes to exclude states from their coverage unless Congress expressly indicates otherwise. If a federal statute does not recite its applicability to states, the inquiry should end. Only if a federal law explicitly governs state behavior do we reach the question of whether the Eleventh Amendment bars a private citizen from suing under the federal statute in federal court.

Welch, 780 F.2d at 1275.

This Court has also suggested that the clear statement rule should be used to determine whether legislation applies to the states. In *Pennhurst State School and Hosp. v. Halderman*, when analyzing legislation purportedly enacted pursuant to the fourteenth amendment, the Court stated:

> Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment.

451 U.S. 1, 16, 101 S.Ct. 1531, 1539 (1981) (*Pennhurst I*). The Court also reaffirmed in *Pennhurst I* that

> if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

451 U.S. at 17, 101 S.Ct. at 1540 (citations omitted).[6] *Cf. DeCanas v. Bica*, 424 U.S. 351, 96 S.Ct. 933 (1976) (before concluding that a state regulation is displaced by a federal statute, a court must find that preemption is the "clear and manifest purpose" of Congress).

The Court's eleventh amendment jurisprudence also argues for applying the clear statement test to decide the substantive question. The Court's eleventh amendment cases have not just been about *where* a state is sued; they have also been about *whether* a state can be sued. The Court has noted on several occasions that a formal indication of Congress' intent to abrogate the states' eleventh amendment immunity ensures that Congress has not imposed significant fiscal burdens on the states without careful thought. *Quern*, 440 U.S. at 344 n.16, 99 S.Ct. at 1147 n.16; *Hutto v. Finney*, 437 U.S. 678, 697 n. 27, 98 S.Ct. 2565, 2577 n.27 (1978); *Employees*, 411 U.S. at 284-85, 93 S.Ct. at 1618. If the clear statement rule applies only to the jurisdictional question, however, then the Court was wrong. If actions under federal statutes can be brought against the states in state court, without an unequivocal expression of congressional intent, then significant fiscal burdens will be placed on the states without any assurance of careful thought by Congress as surely as if the actions were prosecuted in federal court. The clear statement rule must apply to both the jurisdictional and substantive halves of sovereign immunity. Then the rule will truly operate to protect the state fisc.

In summary, before an act of Congress is read as stripping a state of her sovereign immunity and subjecting her to an action for money damages, the Court should require Congress to unequivocally express such an intention.

B. The Jones Act does not unequivocally express an intention by Congress to abrogate the immunity of the states.

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6. *Parden*'s "constructive" consent theory is certainly not consistent with *Pennhurst I*. Given *Garcia*, *Parden*'s "constructive" consent theory is also unnecessary. Under *Garcia*, Congress can presumably authorize an action for money damages against a state in state or federal court if it merely unequivocally expresses its intention to do so.

1. The general term "any seaman" is not an unequivocal expression that includes seamen employed by the states.

Plaintiff makes the simple argument that "any seaman" means "any seaman," including a seaman employed by the state. However, general terms (for example, person, persons, bodies politic, etc.) are not unequivocal expressions. *United States v. United Mine Workers*, 330 U.S. 258, 271-73, 67 S.Ct. 677, 685-86 (1947). By their very nature, general terms do not give the specific notice or show the specific contemplation required to abrogate immunity. *Id.* Thus, the general authorization in the Jones Act that "any seaman" may bring suit, like the general authorization in the Civil Rights Act that "every person" shall be liable, is not a sufficiently unequivocal statement from which to conclude that Congress intended to abrogate the immunity of the states.[7] *See Quern*, 441 U.S. at 340-45, 99 S.Ct. at 1145-47.

Of course, in *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565 (1978), language in the Civil Rights Attorneys' Fee Award Act, 42 U.S.C. § 1988, no more specific than that of the Jones Act was found to abrogate immunity. The *Hutto* court, however, expressly relied on compelling legislative history to find an abrogation of immunity. 437 U.S. at 694, 98 S.Ct. at 2575. In addition, the *Hutto* court was careful to emphasize that an award of litigation costs is different from "retroactive liability for prelitigation conduct." 437 U.S. at 695-698, 98 S.Ct. at 2575-77. Costs have traditionally been awarded without regard to sovereign

7. In addition to the Fifth Circuit, the Eleventh Circuit has also held that the terms of the Jones Act do not abrogate the immunity of the state to suit in federal court. *Sullivan v. Georgia Dep't of Natural Resources*, 724 F.2d 1478, 1481, *reh'g en banc denied*, 729 F.2d 782 (11th Cir.), *cert. denied*, 469 U.S. 872, 105 S.Ct. 222 (1984). Both the Fifth and Eleventh Circuits expressly reserved whether the Jones Act substantively applies to the states. *See Welch*, 780 F.2d at 1273; *Sullivan* 724 F.2d at 1481. Six federal district courts, including the *Welch* district court, have also addressed in published decisions whether the Jones Act authorizes suit against the state in federal court. The four district courts that found a congressional intent to abrogate the immunity of the states did not even refer to the clear statement rule of statutory construction. *See Brody v. North Carolina*, 557 F. Supp. 184, 186 (E.D.N.C. 1983); *In re Holohola*, 512 F.Supp. 889, 902-05 (D. Haw. 1981); *Huckins v.*

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immunity. *Id.* As the Court made clear in *Quern*, *Hutto* does not alter the fundamental rule that general terms cannot abrogate immunity. 441 U.S. at 344 n.16, 99 S.Ct. at 1147 n.16.

Plaintiff, however, cites *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 283-83, 79 S.Ct. 785, 790 (1959), for the proposition that Congress intended to include the states in the class of employers subject to the Jones Act by providing that "any seaman" could sue his employer. The *Petty* court suggested that because Congress did not expressly exempt seamen employed by the states from the Jones Act, then "any seaman" includes seamen employed by the states.[8]

The *Petty* court's interpretation of the Jones Act is of dubious weight as a precedent for many reasons. First, *Petty* turned on consent to suit; the holding that the Tennessee-Missouri Bridge Commission was included in the Jones Act was an afterthought, at best an alternative rationale. 359 U.S. at 276-83, 79 S.Ct. at 787-90. Second, what *Petty* has to say about whether the Jones Act applies to the states is merely dicta. The parties before the Court were Petty and the Tennessee-Missouri Bridge Commission. No state was before the Court. Because bi-state agencies are subject to special con-

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Board of Regents of Univ. of Michigan, 263 F. Supp. 622, 623 (E.D. Mich. 1967); *Cocherl v. Alaska*, 246 F. Supp. 328, 329-30 (D. Ala. 1965). The two district courts that found no congressional intent to abrogate the immunity of the states employed the clear statement rule of statutory construction. *See Smith v. Louisiana*, 586 F. Supp. 609, 614 (E.D. La. 1984); *Welch v. State Dep't of Highways and Public Transp.*, 533 F. Supp. 403, 406 (S.D. Tex. 1982).

8. The *Petty* court ignored the last sentence of the Jones Act: "Jurisdiction in such action shall be under the court of the district in which the defendant employer *resides* or in which his *principal office* is located." 46 U.S.C. § 688(a) (emphasis added). This sentence strongly implies by the use of the terms "resides" and "principal office" that Congress had in mind natural persons and corporations, not states. In any event, no significance should be placed in the fixing of jurisdiction in a federal district court. This Court long ago settled that this provision relates to venue, not jurisdiction, and that states have concurrent jurisdiction over Jones Act claims. *See Engle v. Davenport*, 271 U.S. 33, 37-38, 46 S.Ct. 410, 411 (1926); *Panama R. Co. v. Johnson*, 264 U.S. 375, 384-85, 44 S.Ct. 391, 392-93 (1924).

gressional control and regulation under the compact clause of the Constitution, article I, § 10, perhaps the clear statement rule need not apply before subjecting a bi-state agency to congressional regulation. After all, a bi-state agency is as much a creature of Congress as of the states. *See Petty*, 359 U.S. at 282 n.7, 79 S.Ct. at 790 n.7. Thus, the alternative holding of *Petty* that a bi-state agency comes within the terms of the Jones Act does not compel the dicta that a state comes within the terms of the Jones Act.

Moreover, how many justices joined in the dicta that the Jones Act applies to the states or what they might have meant is murky. Three justices dissented and expressly refused to reach the substantive question whether the Jones Act applies to the states. 359 U.S. at 289, 79 S.Ct. at 794. Three justices concurred but expressly noted that they did not reach the eleventh amendment issue, implying that they saw the case as turning on the sue-and-be-sued clause imposed by Congress as a condition of approving the compact. 359 U.S. at 283, 79 S.Ct. at 791. Only three justices clearly joined in the dicta that the Jones Act applies to the states.

The final and most significant problem with *Petty*, however, is that the three justices who did clearly conclude in dicta that the Jones Act applies to the states did not employ the clear statement rule. 359 U.S. at 282-83, 79 S.Ct. at 790. Stare decisis has limited application in a case of constitutional immunity. *See Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 321, 97 S.Ct. 582, 592 (1977); *Edelman v. Jordan*, 415 U.S. 651, 671, 94 S.Ct. 1347, 1395-60 (1974). Dicta should have even less application. The dicta that the states are included in the Jones Act, which is embedded in an alternative holding, should have no application at all in light of the importance of the clear statement rule in protecting the states in the federal system. As Judge Higginbotham reasons in his concurring opinion below, if the political process is to protect the states' interest, as *Garcia* promises, "*Garcia* must ultimately lead to the rejection of *Petty's* construing presumption." *Welch*, 780 F.2d at 1277.

Rejecting the *Petty* court's dicta that the Jones Act applies to the states will not significantly disrupt either established legal principles or practices based upon established legal prin-

ciples. Unlike the statutory construction in *Parden*, which need not be reversed even though its rationale must be rejected, the dicta about the Jones Act in *Petty* should have no force. The statutory construction as it relates to the states in *Parden* is part of a holding, while the statutory construction as it relates to the states in *Petty* is not. *Parden* has arguably been relied upon in a significant fashion. *Petty* has not. To begin with, state seamen are few in number and are protected by state workers' compensation. Moreover, the states appear to have disregarded the *Petty* dicta. *See Lyons v. Texas A & M University*, 545 S.W.2d 56 (Tex. Civ. App.—Houston [14 Dist.] 1976, writ ref'd n.r.e.); *Gross v. Washington State Ferries*, 59 Wash. 2d 241, 367 P.2d 600 (1961). The Court has no reason to give weight to *Petty*, and should hold that the general term "any seaman" does not include seamen employed by the states.

2. The legislative history of the Jones Act is silent about the states and therefore not an unequivocal expression of congressional intent.

Just as the use of the term "any seaman" does not provide any assurance that Congress considered the interest of the states or intended to include them within the Jones Act, nothing in the legislative history of the Jones Act provides such comfort. Indeed, the legislative history should be positively discomforting to those who argue that the Jones Act applies to the states or authorizes suit in federal court. When Congress intends to abrogate the constitutional right of state immunity, one would naturally expect the legislative history of the statute in which it does so to reflect this intention. *Quern*, 440 U.S. at 343, 99 S.Ct. at 1146. As noted by the district court, however, plaintiff in this case points to nothing in the legislative history of the Jones Act to suggest that Congress intended to abrogate the constitutional right of immunity. *Welch v. State Dep't of Highways*, 533 F. Supp. 403, 406 (S.D. Tex. 1982). Likewise, Judge Brown in his dissenting opinion in the Fifth Circuit points to nothing in the legislative history of the Jones Act to support his conclusion that Congress intended to abrogate the constitutional right of immunity. *Welch*, 780 F.2d at 1277-90.

Texas, however, presented the Fifth Circuit with an indepen-

dent examination of the legislative history of the provision in question—46 U.S.C. § 688(a). In its present form this provision became law in 1920 and has never been amended. Commonly known as the Jones Act, it was part of the Merchant Marine Act of 1920 and received scant attention from Congress. *See* G. Gilmore & C. Black, *The Law of Admiralty* § 6-20 at 327 (2d ed. 1975).

The legislative history reveals no intention to create a right and remedy against the states, to abrogate immunity to suit in federal court, or to subject the states to Jones Act claims in their own courts. *See Providing for the Disposition, Regulation, or Use of Property Built or Acquired by the United States: Hearing of H.R. 10378 Before the House Comm. on the Merchant Marine and Fisheries,* 66th Cong., 1st Sess. (1919); *Establishment of an American Merchant Marine: Hearings Before the Senate Comm. on Commerce,* 66th Cong., 2d Sess. (1919-1920); H.R. Rep. No. 443, 66th Cong., 1st Sess. (1919); H.R. Rep. No. 1093, 66th Cong., 2d Sess. (1920); H.R. Rep. No. 1102, 66th Cong., 2d Sess. (1920); H.R. Rep. 1107, 66th Cong., 2d Sess. (1920); S. Rep. No. 573, 66th Cong., 2d Sess. (1920); 59 Cong. Rec. 6494, 6803-6816, 6857-6869, 6985-6994, 6036, 7043-7048, 7163,7164, 7198, 7211, 7223-227, 7274, 7291, 9293-9296, 7326, 7344, 7336, 7347-7356, 7409-7420, 7504, 8163, 8182, 8290, 8334, 8412, 8442, 8465-8470, 8487, 8489, 8493, 8572, 8576, 8488-8609, 8620, 8622, 8678, 9360, 9367 (1920). *See also The Establishment and Development of an Adequate Merchant Marine as Suggested by the United States Shipping Board: A Communication to Hon. Wm. S. Greene, Chairman of the House Comm. on the Merchant Marine and Fisheries,* 66th Cong., 1st Sess. (1919); *President's Message to Congress on the American Merchant Marine,* H.R. Doc. 201, 67th Cong., 2d Sess., 9 (1922).

What the legislative history does reveal is that the Merchant Marine Act of 1920 was adopted to address two post-World War I problems: an inadequate merchant marine and a surplus of navy vessels. S. Rep. No. 573, 66th Cong., 2d Sess., 1, 4 (1920); H.R. Rep. 443, 66th Cong., 1st Sess., 2 (1919). These two concerns dominate the legislative history. No mention is made of suits against the states or of seamen employed by the

states.[9]

Because it is inconceivable that the representatives of the several states would have passed a provision intended to abrogate the constitutional right of immunity without comment, one can only conclude that they did not intend this provision to apply to state seamen. With no mention in the language of the statute or the substance of the proceedings before Congress that the Jones Act might subject the states to federal claims for money damages or suits in federal court, to conclude otherwise would be to renege on the promise of *Garcia* that the states will have an opportunity to defend themselves in the political process and that Congress will carefully weigh their interests.

3. The incorporation of the FELA is not an unequivocal expression of congressional intent.

Not finding a clear statement in the terms or legislative history of the Jones Act, plaintiff turns to a theory of incorporation. The Jones Act incorporates the Federal Employers' Liability Act, 45 U.S.C. § 51, as follows:

> *Any seaman* who shall suffer personal injury in the course of his employment *may,* at his election, *maintain an action* for damages at law, with the right of trial by jury, and *in such action* all statutes of the United States modifying or extending the common-law right to remedy in cases of personal injury to

9. At least one commentator who has studied the history of the Jones Act has concluded that relief under its terms is not available to those serving on public vessels. J. Willock, *Commentary on Maritime Workers,* 46 U.S.C.A. 211, 258 (West 1944). Professor Willock bases his assumption partly on 46 U.S.C. § 713, which defined a seaman as "every person who serves in any capacity on board a *vessel belonging to a citizen* of the United States . . . ." Act of Dec. 21, 1898, ch. 28, §§ 23 & 26, 30 Stat. 762, 764 (repealed 1983) (emphasis added). As the Second Circuit explains, a "seaman" under the Jones Act should be determined with reference to this historical definition of "seaman." *Gerradin v. United Fruit Company,* 60 F.2d 927, 927-29 (2d Cir.) (Hand, Augustus, J.), *cert. denied,* 287 U.S. 642, 53 S.Ct. 92 (1932). States, of course, are not citizens. Persons serving on a vessel belonging to a state were therefore not seamen under 46 U.S.C. § 713 and should therefore not be seamen under 46 U.S.C. § 688(a).

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railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and *in such action* all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principle office is located.

46. U.S.C. § 688(a) (emphasis added).

Plaintiff offers a two-step argument why the incorporation of the FELA shows congressional intent to abrogate immunity to a Jones Act claim. First, plaintiff notes, the FELA authorizes suit against the state when the state employs a railwayman. *See Parden v. Terminal Ry.*, 377 U.S. 184, 84 S.Ct. 1207 (1964). Second, plaintiff argues, because the Jones Act incorporates the FELA, the Jones Act must authorize a suit against the state when the state employs a seaman.

Plaintiff's argument is flawed. The Jones Act does not incorporate the FELA as to *who* may sue. A careful examination of the portion of the Jones Act italicized above reveals that the Jones Act incorporates the FELA's standards of liability as to "such action" authorized by the Jones Act. The Jones Act, however, does not incorporate the FELA to define who may sue or be sued. The statute defines who may sue or be sued only by the terms "Any seaman . . . may . . . maintain an action . . . ." As explained, this general authorization is not an unequivocal expression.

In dissent below, Judge Brown colorfully—but inaccurately—asserts that the language of the FELA was "swallowed up hook, line, and sinker by the Jones Act." *Welch*, 780 F.2d at 1282. Color cannot be substituted for statutory analysis. Neither plaintiff nor Judge Brown deals with Texas' argument that the Jones act refers to the FELA only to define the rights and remedies of those authorized to bring suit under the Jones Act and not to define who may bring suit.

The purpose of incorporation of the FELA into the Jones Act was merely to extend to seamen who may maintain an action under the Jones Act the remedies available to railway workers, and thereby obliterate the traditional distinctions between the kinds of negligence for which a shipowner is liable. *See Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 545-48, 80 S.Ct. 926, 930-31 (1960). Nothing in the jurisprudential history of the Jones Act suggests that the purpose of incorporation was to define who is a seaman.

Finally, plaintiff's incorporation argument is the worst kind of bootstrapping. When Congress enacted the Jones Act in 1920, it had no idea that the FELA, earlier enacted in 1908, would be held in *Parden* in 1964 to authorize a railway employee to sue a state employer. *Parden* itself is based upon the now discredited theory of applying a federal statute to a state entering into a federally regulated sphere of activity. 377 U.S. at 196, 84 S.Ct. at 1215. While as a matter of stare decisis and the presumtive validity of the construction of a legislative enactment, the holding in *Parden* may have vitality, its discredited rationale has been laid to rest and should have no force beyond its grave. Thus, the incorporation of the FELA in the Jones Act is not an unequivocal expression of congressional intent to abrogate the immunity of the state.

C. Because the Jones Act excludes federal seamen, Congress must also have intended to exclude state seamen.

Seamen employed by the federal government who suffer personal injury in the course of their employment have recourse against the United States only for workers' compensation under the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 8101 *et. seq.* Pursuant to the FECA, the Court has held that workers' compensation is the exclusive remedy for civilian seamen in the employ of the federal government on public vessels. *Johansen v. United States*, 343 U.S. 427, 72 S.Ct. 849 (1952). Likewise, the Court has held that workers' compensation is the exclusive remedy for civilian seamen in the employ of the federal government on merchant vessels. *Patterson v. United States*, 359 U.S. 495, 79 S.C. 936, *reh'g denied*, 360 U.S. 914, 79 S.Ct. 1293 (1959). Thus, federal seamen cannot sue the United States under the Jones Act. *Mills v. Panama Canal Co.*,

272 F.2d 37 (2d Cir. 1959), *cert. denied*, 362 U.S. 961, 80 S.Ct. 877 (1960).

That federal seamen are limited to federal workers' compensation is instructive as to how this case should be decided in three ways. First, that federal seamen cannot bring suit under the Jones Act bears upon the meaning of "any seaman." Plaintiff argues that "any seaman" is an unequivocal expression of congressional intent to provide a remedy for *all* seamen, including seamen employed by the states. If "any seaman" is an unequivocal expression that includes seamen employed by the states, however, then "any seaman" should logically include seamen employed by the United States. Yet this Court has held that seamen employed by the United States are limited to compensation under the FECA. If "any seaman" does not include seamen employed by the United States, then it is not an unequivocal expression.

Second, what the Court discerns to be congressional intent as to whether federal seamen are covered by the Jones Act bears on congressional intent about state seamen. Judge Brown disagrees. In dissent he writes: "How Congress treats federally-employed seamen simply has nothing to do with its determination that state-employed seamen are covered by the Jones Act." *Welch*, 780 F.2d at 1290. Judge Brown assumes the answer to the critical question and thus misses the point. The question is whether state-employed seamen *are* covered by the Jones Act. Whether federally-employed seamen are covered by the Jones Act helps answer that question. Obviously Congress could treat federal seamen different from state seamen. Surely, however, different results do not follow *from the same statutory language*.

Because the United States is sovereign, the general terms of the Jones Act ("any seaman") are an insufficient statement of intent from which to infer that Congress wished the Jones Act to apply to the United States. Put bluntly, the sovereignty of the United States is so important that the Court will not infer from mere general terms that Congress intended to restrain or to diminish the sovereign rights of the nation. *See United Mine Workers*, 330 U.S. at 272-73, 67 S.Ct. at 686. Were it not for the "legislative breach in the wall of sovereign im-

munity" provided by the FECA, federal seamen would have no remedy against the United States for personal injuries suffered in the course of their employment. *Johansen*, 343 U.S. at 439-40, 72 S.Ct. at 857.

If federalism means anything, it should at least mean that the legal principles for construing statutes and deciding sovereign immunity questions are the same for the individual states as for the United States. *Cf. Tindal v. Wesley*, 167 U.S. 204, 213, 17 S.Ct. 770, 773 (1897) ("But it cannot be doubted that the question whether a particular suit is one against the state, within the meaning of the constitution, must depend upon the same principles that determine whether a particular suit is one against the United States."). Unless there is some principled reason why the rule of construction of federal statutes should be different when applying the statute to the individual states than when applying the statute to the United States, then the Jones Act should no more be held to apply to Texas than it does to the United States. Texas seamen should seek their remedy in workers' compensation just as federal seamen do.

Finally, that the Jones Act excludes federal seamen exposes as bogus the argument that Texas must be subject to the Jones Act because Congress must have intended all seamen to be treated alike because the whole point of admiralty law is uniformity. In fact, the uniformity principle works in Texas' favor: Texas seamen, like federal seaman, are protected by compensation, not the Jones Act. All seamen employed by sovereigns are treated alike.[10] Congress can waive the sovereign immuni-

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10. Admiralty law has always made special provision for both the sovereign United States and the sovereign individual states. As already noted, in *New York I* and *New York II*, decided on the same day, the Court held respectively that sovereign immunity bars an admiralty action in rem and in personam against a state. By resting these decisions on the doctrine of sovereign immunity, the Court implicity acknowledged that the states—like the United States—are immune from all suits in admiralty. Indeed, the Court said exactly this in *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868), which was an admiralty libel in rem against a vessel of the United States. The Court reasoned that because the states as sovereigns would be immune to such a suit in their own courts, then the United States as sovereign should be entitled to the same protection.

(Footnote continued on next page)

ty of the United States and subject it to suits in admiralty for money damages. Likewise, Congress can presumably abrogate the sovereign immunity of the states and subject them to suits in admiralty for money damages. The point, however, is that Congress has done neither in the Jones Act.

II. TEXAS HAS NOT CONSENTED IN THE TEXAS TORT CLAIMS ACT TO A JONES ACT CLAIM FOR MONEY DAMAGES AGAINST THE STATE IN FEDERAL COURT.

Plaintiff argues in her brief on the merits that Texas has expressly consented in the Texas Tort Claims Act, ch. 242, 1969 Tex. Gen. Laws 874, *amended by* ch. 50, 1973 Tex. Gen. Laws 77,[11] to a Jones Act claim for money damages against the state in federal court. *Brief for the Petitioner* at 29-34. In making this argument, plaintiff tries "smuggling additional ques-

(Footnote continued from previous page)

This reasoning, that the states are immune from an admiralty suit brought in either federal or state court, is not at all at odds with *Workman v. New York City*, 179 U.S. 522, 21 S.Ct. 212 (1900). The *Workman* court's admonition that an entity with the capacity to stand in judgment in admiralty cannot escape liability based on local law is easily reconcilable. Unlike *Workman*, where the municipal corporation claimed immunity based upon local law, a state—just as the United States—claims immunity based upon admiralty law's own constitutionally required recognition of sovereign immunity.

11. The Texas Tort Claims Act was approved May 22, 1969, and became effective on January 1, 1970. *See* Texas Tort Claims Act, ch. 292, 1969 Tex. Gen. Laws 874. In 1973 the act was amended. *See* Texas Tort Claims Act, ch. 50, 1973 Tex. Gen. Laws 77. In 1983 the act was again amended. *See* Texas Tort Claims Act, ch. 530, 1983 Tex. Gen. Laws 3084. Because plaintiff's claim arose on March 4, 1981, the date of her injury (J.A. 9), her claim is governed by the 1973 version of the act rather than the 1983 version. *See* Texas Tort Claims Act, ch. 530, § 2, 1983 Tex. Gen. Laws 3084. The 1973 version is reproduced in the appendix.

In 1985, pursuant to the state's continuing statutory revision program, the act was recodified as part of the Civil Practice and Remedies Code. *See* Civil Practice and Remedies Code, ch. 959, 1985 Tex. Gen. Laws 3302. In this form, the act is now found at Tex. Civ. Prac. & Rem. Code §§ 101.002-.109 (Vernon 1986). This recodification works no substantive change in the act. *See* Tex. Civ. Prac. & Rem. Code § 1.001(a)(Vernon 1986). In any event, the recodification is of no relevance to this case because the 1973 version controls plaintiff's claim.

tions into [the] case after [the court has] granted certiorari." *See Irvine v. California*, 347 U.S. 128, 129, 74 S.Ct. 381, 381 (1954). Supreme Court Rule 34.1(a) plainly states that "the brief may not raise additional questions or change the substance of the questions already presented [in the petition for certiorari]." *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 6.26 at 363-68 (6th ed. 1986). The petition for certiorari presents only two questions: 1) whether the eleventh amendment bars a Jones Act claim against a state in federal court; and 2) whether the doctrine of implied waiver of sovereign immunity is still viable. *See Petition for a Writ of Certiorari* at (i). Nowhere in her petition does plaintiff argue that Texas expressly consented by statute to a Jones Act claim for money damages against the state in federal court. In her brief, however, plaintiff belatedly attempts to expand her case to include express consent. The Court should not even consider this untimely raised issue.

Had plaintiff timely raised the issue in her petition for certiorari, the issue would have been exposed as unworthy of review under Supreme Court Rule 17. What a state statute means is of course completely a question of state law, including whether a state statute is a consent to suit. *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464-65, 65 S.Ct. 347, 350-51 (1945). Both the district court and the Fifth Circuit squarely held in this case that Texas has not expressly consented in the Texas Tort Claims Act to a Jones Act claim for money damages against the state in federal court. *Welch*, 533 F. Supp. at 406-07; *Welch*, 780 F.2d at 1273-75. This Court customarily accepts "the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion." *Bishop v. Wood*, 426 U.S. 341, 346, 96 S.Ct. 2074, 2078 (1976).

Moreover, both the district court's and the Fifth Circuit's holdings are based upon an authoritative interpretation of the Texas Tort Claims Act by a state court of appeals. *See Lyons v. Texas A & M University*, 545 S.W.2d 56 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.). The judgment of the state court of appeals was approved by the Texas Supreme Court; the judgment of the state court of appeals could not be

correct unless the holding is also correct; therefore, the Texas Supreme Court implicitly approved the holding. *Welch*, 780 F.2d at 1274-75 (Gee, J., concurring).

There is nothing of importance for this Court to review. Had the question of express consent been presented in the petition for certiorari, the Court undoubtedly would have limited its grant of certiorari to exclude this state-law issue. *See Irvine*, 347 U.S. at 129-30, 74 S.Ct. at 381. Nevertheless, Texas will explain in detail why plaintiff cannot proceed under the Texas Tort Claims Act.

Before the question of consent in the Texas Tort Claims Act even arises, of course, plaintiff must establish that Congress intended the Jones Act to apply to the states. For if Congress did not intend the Jones Act to authorize a seaman employed by a state to sue a state for money damages, then the question of consent to suit in federal court is irrelevant. If the Court has found persuasive Texas' argument that Congress did not intend the Jones Act to apply to the states, then there is no reason to consider the Texas Tort Claims Act. If, however, the Court has concluded that the Jones Act does apply to the states—but does not by its own terms authorize suit in federal court—then there is reason to consider whether Texas has consented in the Texas Tort Claims Act.

To win her argument that Texas has consented to suit, plaintiff must show two things. First, plaintiff must show that a claim under the Texas Tort Claims Act can be brought in federal court. Second, plaintiff must show that her Jones Act claim comes within the terms of the Texas Tort Claims Act. If plaintiff fails to establish either point, then she cannot proceed in federal court under the Texas Tort Claims Act. Plaintiff fails. As will be demonstrated in subpart A, claims under the Texas Tort Claims Act cannot be brought in federal court. As will be demonstrated in subpart B, claims under the Jones Act do not come within the terms of the Texas Tort Claims Act.

A. The Texas Tort Claims Act does not waive immunity to suit in federal court.

1. To read a state statute as waiving immunity to suit in federal court, the state statute must clearly declare such an intention.

A state's "constitutional interest in immunity encompasses not only *whether* it may be sued, but *where* it may be sued." *Pennhurst II*, 465 U.S. at 99, 104 S.Ct. at 907. Thus, a state's waiver of sovereign immunity in its own courts is not a waiver of immunity to suit in federal court. 465 U.S. at 99 n.9, 104 S.Ct. at 907 n.9. *Atascadero*, 105 S.Ct. at 3147. This Court can find that there has been a waiver of immunity to suit in federal court only when it is "stated [in the state statute] 'by *the most express language or* by *such overwhelming implications from the text* as will leave *no* room for *any* other reasonable construction.' " *Edelman*, 415 U.S. at 673, 94 S.Ct. at 1360-61 (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171, 29 S.Ct. 458, 464 (1919)) (emphasis added).

2. The Texas Tort Claims Act does not clearly declare that Texas waives its immunity to suit in federal court.

Surprisingly, even though the Texas Tort Claims Act is over fifteen years old, the Fifth Circuit has never had occasion to address whether the act is a waiver of immunity to suit in federal court. In this case, because the Fifth Circuit decided that a Jones Act claim did not come within the act, it did not discuss whether the act authorized suit in federal court. *Welch*, 780 F.2d at 1273-74. While the federal district courts in Texas regularly dismiss suits under the Texas Tort Claims Act as being barred by the eleventh amendment, there are four published opinions to the contrary. *See Keiffer v. Southern Pacific Transp. Co. v. Corrigan-Cander Ind. School Dist., 486 F. Supp. 798 (E.D. Tex. 1980); Misfud v. Palisades Geophysical Institute, Inc.*, 484 F. Supp. 159 (S.D. Tex. 1980); *Lester v. County of Terry, Texas*, 353 F. Supp. 170 (N.D. Tex. 1973), *aff'd on other grounds*, 491 F.2d 975 (5th Cir. 1973); *Flores v. Norton & Ramsey Lines, Inc.*, 352 F. Supp. 150 (W.D. Tex. 1972).

The most extensively reasoned of these four case is the first case in the line—*Flores*. The opinion in *Flores*, however, was written prior to *Edelman* and does not employ the standard of construction requiring unequivocal consent as outlined in *Edelman* and reaffirmed in *Atascadero*. Not only does the

Flores court not employ the correct standard of statutory construction, its reasoning is completely unpersuasive.

Reading the Texas Tort Claims Act from the first word to the last produces no "express language" that Texas intended to waive her immunity to suit in federal court. In § 4, the act does authorize "all claimants" to sue, which is noted by the *Flores* court. 352 F. Supp. at 153. "All claimants," however, addresses *who* may sue, not *where* they may sue. Nothing in the act contemplates a claimant bringing suit in federal court.

Moreover, after a fair reading of the statute, one can only conclude from the implications of its provisions that Texas did not intend to waive immunity to suit in federal court. First, § 5 expressly provides that suit shall be instituted "in the county," not "the district," in which the cause of action arose. The *Flores* court notes that this provision merely relates to venue. 352 F. Supp. at 153. This reasoning misses the point. The legislature assumed suit in a state court, subject to state venue. As the Fifth Circuit explained when reviewing another Texas statute for waiver of immunity to suit in federal court: "The fixing of venue in Texas counties indicates strongly that the intended waiver applied to state court proceedings." *United Carolina Bank v. Board of Regents*, 665 F.2d 553, 559 (5th Cir. 1982).

Second, § 7 expressly provides that "the Texas Rules of Civil Procedure" shall govern. Because statutes are generally presumed to be enacted by the legislature with full knowledge of the law, one must assume that the legislature knew that only the Federal Rules of Civil Procedure could be applied in federal court. *See Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136 (1965). Because the legislature specified that the Texas Rules of Civil Procedure would govern, it must have intended that cases under the Texas Tort Claim Act be in state court. The *Flores* court argues that the provision for state rules to apply is only "insofar as applicable," and therefore does not evidence an intention for suits to be in state court. 352 F. Supp. at 153. The *Flores* court, however, is guilty of selective editing. Section 7 says "insofar as applicable and to the extent that such rules are not inconsistent with the provisions of the Act," indicating that the question contemplated by the legislature was

whether the state rules fit with the statute, not whether federal rules might ever be applicable.

This analysis of the implications of the provisions of the statute is confirmed by the legislative history of the act. The act was introduced as House Bill 456 in the Sixty-First Regular Session in 1969. Its legislative history is sparse; there are no hearings, reports, debates, gubernatorial messages, or other background available. There is, however, an important and lengthy interim committee report from the committee whose work culminated in the act. *See* Senate Interim Committee to Study Governmental Immunity, *Report to the 61st Legislature* (Jan. 14, 1969) (available in the Texas Legislative Reference Library). Reading this report cover to cover produces not a single shred of evidence that the legislature contemplated waiving immunity to suit in federal court. In fact, as with the act itself, a fair reading of the report leads to the conclusion that the legislature never contemplated that cases under the act would be in federal court.

The approach of the *Flores* court, urged by plaintiff, must be rejected. Nice distinctions and fine reasoning have no place when questions of federalism are concerned. As this Court has cautioned, "it is not consonant with our dual system for the Federal courts to be astute to read the consent [to be sued] to embrace Federal as well as state courts." *Great Northern Life Ins. v. Read*, 322 U.S. 47, 54, 64 S.Ct. 873, 877 (1944). Without a clear declaration of intent, the Court should not read the Texas Tort Claims Act as consent to suit in federal court. *Id.* For this reason alone, plaintiff cannot proceed in federal court under the Texas Tort Claims Act.

B. A Jones Act claim does not come within the terms of the Texas Tort Claims Act.

1. The Texas Tort Claims Act authorizes only state-law negligence actions for limited liability.

Even assuming that the Texas Tort Claims Act authorizes suits against the state in federal court, obviously it only authorizes such suits as come within its terms. Jones Act claims do not come within the liability provisions of the act. The state

is liable pursuant to § 3 of the act as follows:

> Each unit of government in the state shall be liable for money damages for . . . personal injuries or death when proximately caused by the negligence or wrongful act or omission of any officer or employee acting within the scope of his employment or office. . . . Such liability . . . shall not extend to punitive or exemplary damages. Liability hereunder shall be limited to $100,000 per person and $300,000 for any single occurrence for bodily injury or death . . . .

Texas Tort Claims Act, ch. 292, 1969 Tex. Gen. Laws 874, *amended by* ch. 50, § 3, 1973 Tex. Gen. Laws 77.

Thus, under the terms of the act, Texas consents to liability for money damages based upon state common-law negligence. The act expressly excludes punitive damages and expressly limits liability to $100,000 per person. A Jones Act claim does not come within these parameters. Under the Jones Act a claimant can recover punitive damages and can recover without limit for his compensatory damages. Moreover, Jones Act liability is different in significant ways from state common-law negligence. For example, recovery under § 3 of the Texas Tort Claims Act requires proof of proximate cause, while recovery under the Jones Act merely requires proof of producing cause. *See Chisholm v. Sabine Towing & Transp. Co., Inc.*, 679 F.2d 60, 62 (5th Cir. 1982). Thus, the Texas Tort Claims Act cannot be read as consent to an action for money damages under the Jones Act.

2. The Texas Tort Claims Act makes workers' compensation the exclusive remedy for state employees.

Assuming arguendo that a Jones Act claim does come within § 3, plaintiff still cannot proceed because whatever § 3 gives is limited by § 19, which provides that state employees cannot bring a § 3 negligence action against the state but are instead limited to workers' compensation. Section 19 provides:

> Any governmental unit carrying Workmen's Compensation Insurance or accepting the provisions of the Workmen's Compensation Act of the State of Texas shall be entitled to all of the privileges and immunities granted by the Workmen's Compensation Act of the State of Texas to private persons and corporations.

Texas Tort Claims Act, ch. 292, § 19, 1969 Tex. Gen. Laws 874, *amended* by ch. 50, 1973 Tex. Gen. Laws 77.

The Department of Highways and Public Transportation protects its employees by carrying workers' compensation insurance. *See* Tex. Rev. Civ. Stat. Ann. art. 6674s (Vernon 1977). Thus, its employees are limited to workers' compensation because under the Workmen's Compensation Act of Texas one of the privileges and immunities granted private persons and corporations is that workers' compensation is the exclusive remedy when provided by an employer. *See* Tex. Rev. Civ. Stat. Ann. art. 8306, § 3, § 3(a) (Vernon Supp. 1986).

Plaintiff offers a different construction of state law. Plaintiff reasons as follows: 1) § 3 of the act makes each unit of government liable for its negligence; 2) § 4 of the act waives sovereign immunity to the extent of liability created in § 3; 3) § 19 limits liability of those governmental units that carry workers' compensation to that of private persons and corporations; 4) because private persons and corporations cannot escape Jones Act liability by providing workers' compensation, then the legislature did not intend Texas to escape Jones Act liability.[12]

Sitting en banc, a majority of the Fifth Circuit rejected this reasoning. The majority concluded that "the obvious purpose" of the act was to make workers' compensation the exclusive remedy for state employees. *Welch*, 780 F.2d at 1273. Moreover,

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12. Plaintiff is of course right when saying that under *Southern Pacific v. Jensen*, 244 U.S. 205, 37 S.Ct. 524 (1916), private persons and corporations cannot escape Jones Act liability by providing workers' compensation. A private employer and a state, however, are different entities with different rights. *Jensen* is inapplicable to the states because the Jones Act is inapplicable to the states. Referring to the state compensation law under these

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the majority found of "controlling importance" that the only state court decision in point, *Lyons v. Texas A & M University*, 545 S.W.2d 56 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.), holds that the act makes workers' compensation the exclusive remedy for state employees. Plaintiff asks this Court to disregard the state appellate court interpretation in *Lyons*. As previously discussed, this holding in *Lyons* was implicitly approved by the Texas Supreme Court and was accepted by both the district court[13] and the Fifth Circuit.

Not only would it be wrong for the Court to substitute its own interpretation of state law, plaintiff's state-law argument is without merit. Whatever § 19 might be read to mean standing alone, it does not stand alone. When the legislature adopted workers' compensation for the highway department in article 6674s, it provided in § 6 as follows:

> Employees of the Department and parents of the minor employees shall have no right of action against the agents, servants, or employees of the Department for damages for personal injuries . . . , but such employees and their representatives and beneficiaries shall look for compensation solely to the Department as is provided in this law.

Tex. Rev. Civ. Stat. Ann. art. 6674s, § 6 (Vernon 1977). "Employee" is defined in § 2 of article 6674s as including "every person in the service of" the department. *See* Tex. Rev. Civ. Stat. Ann. art. 6674s, § 2 (Vernon 1977).

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circumstances is not an anomaly. Admiralty law has often looked to state law to provide the liability rule. *See, e.g., Bethlehem Steel Company v. Moores*, 335 U.S. 875, 69 S.Ct. 239 (1948) (allowing state compensation for an injury suffered aboard a vessel in San Francisco Bay); *Millers Indemnity Underwriters v. Braud*, 270 U.S. 59, 46 S.Ct. 194 (1926) (allowing state compensation when an underwater worker suffocated while removing obstacles to navigation in navigable waters); *Western Fuel v. Garcia*, 257 U.S. 233, 42 S.Ct. 89 (1921) (allowing the application of a state wrongful death statute when a stevedore was killed at work abroad a vessel).

13. The author of the state court of appeal's three-judge-panel opinion in *Lyons*, The Honorable George E. Cire, moved from the state bench, to the federal bench, and then authored the district court opinion in *Welch*. This certainly strengthens the assumption that he knew and understood state law.

Plaintiff ignores article 6674s. Under the doctrine of *in pari materia*, article 6674s is, however, the governing statute. If there is any conflict between the Texas Tort Claims Act and article 6674s, then the more specific article 6674s controls. *See* 53 Tex. Jur. 2d *Statutes* § 186 (1964 & Supp. 1986). Thus, either the Texas Tort Claims Act should be construed consistently with article 6674s, as the Fifth Circuit reasons, 780 F.2d at 1273, or article 6674s controls as the more specific, as the district court reasons, 553 F. Supp. at 406-07. In either event, highway employees have no right of action against the state under the Texas Tort Claims Act.

CONCLUSION

WHEREFORE, for all these reasons, respondents pray that the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

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APPENDIX

U.S. Const. art. III, § 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. amend. XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Necessary and Proper Clause, U.S. Const. art. I, § 8.

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof.

The Jones Act, 46 U.S.C. § 688.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating

the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

The Texas Tort Claims Act, ch. 292, 1969

Tex. Gen. Laws 874, *amended by* ch. 50, 1973 Tex. Gen. Laws 77.

Section 1. This Act shall be known and cited as the Texas Tort Claims Act.

Sec. 2. The following words and phrases as used in this Act unless a different meaning is plainly required by the context shall have the following meanings:

(1) "Unit of government" or "units of government" shall mean the State of Texas and all of the several agencies of government which collectively constitute the government of the State of Texas, specifically including, but not to the exclusion of, other agencies bearing different designations, all departments, bureaus, boards, commissions, offices, agencies, councils and courts; all political subdivisions, all cities, counties, school districts, levee improvement districts, drainage districts, irrigation districts, water control and preservation districts, fresh water supply districts, navigation districts, conservation and reclamation districts, soil conservation districts, river authorities, and junior college districts; and all institutions, agencies and organs of government whose status and authority is derived either from the Constitution of the State of Texas or from laws passed by the Legislature pursuant to such Constitution. Provided, however, no new unit or units of government are hereby created.

(2) "Scope of employment" or "scope of office" shall mean that the officer, agent or employee was acting on behalf of a governmental unit in the performance of the duties of his office or employment or was in or about the performance of tasks lawfully assigned to him by competent authority.

(3) "Officer, agent or employee" shall mean every person who

is in the paid service of any unit of government by competent authority, whether full or part-time, whether elective or appointive, and whether supervisory or nonsupervisory, it being the intent of the Legislature that this Act should apply to every person in such service of a unit of government, save and except as herein provided. Such definition, however, shall not include an independent contractor or an agent or employee of an independent contractor, or any person performing tasks the details of which the unit of government does not have the legal right to control.

Sec. 3. Each unit of government in the state shall be liable for money damages for property damage or personal injuries or death when proximately caused by the negligence or wrongful act or omission of any officer or employee acting within the scope of his employment or office rising from the operation or use of a motor-driven vehicle and motor-drive equipment, other than motor-driven equipment used in connection with the operation of floodgates or water release equipment by river authorities created under the laws of this state, under circumstances where such officer or employee would be personally liable to the claimant in accordance with the law of this state, or death or personal injuries so caused from some condition or some use of tangible property, real or personal, under circumstances where such unit of government, if a private person, would be liable to the claimant in accordance with the law of this state. Such liability is subject to the exceptions contained herein, and it shall not extend to punitive or exemplary damages. Liability hereunder shall be limited to $100,000 per person and $300,000 for any single occurence for bodily injury or death and to $10,000 for any single occurrence or injury to or destruction of property."

Sec. 4. To the extent of such liability created by Section 3, immunity of the sovereign to suit, as heretofore recognized and practiced in the State of Texas with reference to units of government, is hereby expressly waived and abolished, and permission is hereby granted by the Legislature to all claimants to bring suit against the State of Texas, or any and all other units of government covered by this Act, for all claims arising hereunder.

Sec. 5. All cases arising under the provisions of this Act shall be instituted in the county in which the cause of action or a part thereof arises.

Sec. 6. This Act shall be cumulative in its legal effect and not in lieu of any and other legal remedies which the injured person may pursue.

Sec. 7. The laws and statutes of the State of Texas and the Rule of Civil Procedure, as promulgated and adopted by the Supreme Court of Texas, insofar as applicable and to the extent that such rules are not inconsistent with the provisions of this Act, shall apply to and govern all actions brought under the provisions of this Act.

Sec. 8. Suits instituted pursuant to the provisions of this Act shall name as defendant the unit of government against which liability is sought to be established. In suits against other units of government citation shall be served in the manner prescribed by law for other civil cases. If no method is prescribed by law, then service may be had on the administrative head of the unit of government being sued, if available, and if not, the court in which the suit is pending may authorize service in such manner as may be calculated to afford the unit of government a fair opportunity to answer and defend the suit.

Sec. 9. The Attorney Geneal of Texas shall defend all actions brought under the provisions of this Act against any unit of government whose authority and jurisdiction is coextensive witht he geographical limits of the State of Texas. All units of government whose area of jurisdiction is less than the entire State of Texas shall employ their own counsel in accordance with the organic act under which such unit of government is operating; provided, however, that all units of government are hereby expressly authorized to purchase policies of insurance providing protection for such units of government, their officers, agents and employees against claims brought under the provisions of this Act, and when they have acquired such insurance, they are further authorized to relinquish to the company providing such insurance coverage the right to investigate, defend, compromise and settle any such claim. In the case of suits defended by the Attorney General, he may

be fully assisted by counsel provided by insurance carrier. Neither the existence or amount of insurance shall ever be admissible in evidence in the trial of any case hereunder, nor shall the same be subject to discovery.

Sec. 10. Any and all causes of action brought under the provisions of this Act may be settled and compromised by the unit of government involved when, in the judgment of the Governor, in the case of the state, and in the judgment of the governing body of the unit of government in other cases, such compromise would be to the best interests of such government. It is specifically provided, however, that such approval shall not be required in those instances where insurance has been procured under the provisions of Section 9 hereof.

Sec. 11. Judgments recovered against units of government pursuant to the provisions of this Act shall be enforced in the same manner and to the same extent as judgments are now enforced against such units of government under the statutes and law of Texas; and no additional methods of collecting judgments are granted by this Act. Provided, however, if the judgment is obtained against a unit of government that has procured a contract or policy of liability or indemnity insurance protection, the holder of the judgment may use such methods of collecting said judgment as are provided by the policy or contract and statutes and laws of Texas to the extent of the limits of coverage provided therein. It is expressly provided, however, that judgments under this Act becoming final during any fiscal year need not be paid by such unit of government until the following fiscal year except to the extent that they may be payable by an insurance carrier. For the payment of any final judgment obtained under the provisions of this Act, a unit of government not fully covered by liability insurance is hereby authorized to levy an ad valorem tax, the rate of which, if found by the unit of government to be necessary, may exceed any legal unit otherwise applicable except as may be imposed by the Constitution of the State of Texas. In the event that judgments arising under the provisions of this Act become final against a unit of government in any one fiscal year in an aggregate amount, exclusive of insurance coverage, if any, in excess of one percent of the budgeted tax funds, exclusive of general obligation debt service requirements, of such unit of

government for such fiscal year, then such unit of government may pay such judgments over a period of not more than five years in equal annual installments and shall pay interest on the unpaid balance at the rate provided by law.

Sec. 12. (a) The judgment or settlement in an action or claim under this Act shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of a unit of government whose act or omission gave rise to the claim.

(b) The State or a political subdivision may not require any employee to purchase liability insurance as a condition of his employment where the State or political subdivision is insured by a policy of liability insurance.

Sec. 13. The provisions of this Act shall be liberally construed to achieve the purposes hereof.

Sec. 14. The provisions of this Act shall not apply to:

(1) Any claim based upon an act or omission which occurred prior to the effective date of this Act.

(2) Any claim based upon an act or omission of the Legislature, or any member thereof acting in his official capacity, or to the legislative functions of any unit of government subject to the provisions hereof.

(3) Any claim based upon an act or omission of any of the courts of the State of Texas, or any member thereof acting in his official capacity, or to the judicial functions of any unit of government subject to the provisions hereof.

(4) Any claim based upon an act or omission of an officer, agent or employee of any unit of government in the execution of the lawful orders of any court.

(5) Any claim arising in connection with the assessment or collection of taxes by any unit of government.

(6) Any claim arising out of the activities of the National

Guard, the State Militia, or the Texas State Guard, when on active duty pursuant to lawful orders of competent authority.

(7) Any claim based upon the failure of a unit of government to perform any act which said unit of government is not required by law to perform. If the law leaves the performance or nonperformance of an act to the discretion of the unit of government, its decision not to do the act, or its failure to make a decision thereon, shall not form the basis for a claim under this Act.

(8) Any claim arising out of the action of an officer, agent or employee while responding to emergency calls or reacting to emergency situations when such action is in compliance with the laws and ordinances applicable to emergency action.

(9) Any claim based on an injury or death connected with any act or omission arising out of civil disobedience, riot, insurrection or rebellion or arising out of the failure to provide, or the method of providing, police or fire protection.

(10) Any claim arising out of assault, battery, false imprisonment, or any other intentional tort including, but not limited to, disciplinary action by school authorities.

(11) Any claim based upon the theory of attractive nuisance.

(12) Any claim arising from the absence, condition, or malfunction of any traffic or road sign, signal, or warning device unless such absence, condition, or malfunction shall not be corrected by the governmental unit responsible within a reasonable time after notice, or any claim arising from the removal or destruction of such signs, signals or devices by third parties except on failure of the unit of government to correct the same within such reasonable time, after actual notice. Nothing herein shall give rise to liability arising from the failure of any unit of government to initially place any of the above signs, signals, or devices when such failure is the result of discretionary actions of said governmental unit. The signs, signals and warning devices enumerated above are those used in connection with hazards normally connected with the use of those used in connection with hazards normally connected with the use of the

roadway, and this section shall not apply to the duty to warn of special defects such as excavations or roadway obstructions.

Sec. 15. Notwithstanding any provisions hereof, the individual immunity of public officers, agents or employees of government from tort claims for damages is hereby preserved to the extent and degree that such persons presently are immunized.

Sec. 16. Except where there is actual notice on the part of the governmental unit that death has occured or that the claimant has received some injury or that property of the claimant has been damaged, any person making a claim hereunder shall give notice of the same to the governmental unit against which such claim is made, reasonably describing the damage or injury claimed and the time, manner and place of the incident from which it arose, within six months, from the date of the incident. Provided, however, except where there is such actual notice, charter and ordinance provisions of cities requiring notice within a charter period permitted by law are hereby expressly ratified and approved.

Sec. 17. No claim or judgment against a state-supported senior college or university, under this Act, shall be payable except by a direct appropriation made by the Legislature for the purpose of satisfying claims and/or judgments, except in the event insurance has been acquired as provided in Section 9, in which case the claimant is entitled to payment to the extent of such coverage as in other cases.

Sec. 18. (a) This Act shall not apply to any proprietary function of a municipality. The term "motor-driven equipment" as used herein shall not be construed so as to include medical equipment, such as, but not limited to iron lungs, located in hospitals.

(b) As to premise defects, the unit of government shall owe to any claimant only the duty owed by private persons to a licensee on private property, unless payment has been made by the claimant for the use of the premises. Provided, however, that the limitation of duty contained in this subsection shall not apply tot he duty to warn of special defects such as

excavations or obstructions on highways, roads or streets, nor shall it apply to any such duty to warn of the absence, condition or malfunction of traffic signs, signals or warning devices as is required in Section 14(12) hereof.

Sec. 19. Any governmental unit carrying Workmen's Compensation Insurance or accepting the provisions of the Workmen's Compensation Act of the State of Texas shall be entitled to all of the privileges and immunities granted by the Workmen's Compensation Act of the State of Texas to private persons and corporations.

Sec. 19A. The provisions of this Act shall not apply to school districts except as to motor vehicles.

Sec. 20. All laws or parts of law, and all enactments, rules and regulations or any and all units of government, and all organic laws of such units of government, in conflict herewith are hereby repealed, annulled and voided, to the extent of such conflict.

Sec. 21. In the event any section, subsection, paragraph, sentence or clause of this Act shall be declared unconstitutional or void, the validity of the remainder of this Act shall not be affected or impaired thereby; and it is hereby declared to be policy and intent of the Legislature to enact the valid portions of this Act, notwithstanding the invalid portions, if any.

Sec. 22. This Act shall be effective from and after January 1, 1970.

Tex. Rev. Civ. Stat. Ann. art. 6674s, § 2 (Vernon 1977).

The following words and phrases as used in this law shall, unless a different meaning is plainly required by the context, have the following meanings, respectively:

1. "Department" whenever used in this law shall be held to mean the State Highway Department of Texas.[1]

2. "Employee" shall mean every person in the service of the State Highway Department under any appointment or

expressed contract of hire, oral or written, whose name appears upon the payroll of the State Highway Department.

Tex. Rev. Civ. Stat. Ann. art. 6674s, § 6 (Vernon 1977).

Employees of the Department and parents of minor employees shall have no right of action against the agents, servants, or employees of the Department for damages for personal injuries nor shall representatives and beneficiaries of deceased employees have a right of action against the agents, servants, or employees of the Department for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the Department as is provided in this law. All compensation allowed herein shall be exempt from garnishment, attachment, judgment, and all other suits or claims, and no such right or action and no such compensation and no part thereof nor of either shall be assignable, except as otherwise herein provided, and any attempt to assign the same shall be void.